

State of South Dakota

EIGHTIETH LEGISLATIVE ASSEMBLY, 2005

916L0123

SENATE BILL NO. _____

Introduced by: _____

1 FOR AN ACT ENTITLED, An Act to PENNINGTON-CHILD PORNOGRAPHY.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 Section 1. The code counsel shall transfer §§ 22-22-24, to 22-22-24.2, inclusive, and §§ 22-
4 22-24.4 to 22-22-25, inclusive, to a new chapter entitled, Child Pornography, and shall
5 renumber the sections accordingly and adjust all appropriate cross references.

6 Section 2. That § 22-22-24 be amended to read as follows:

7 22-22-24. Any person who sells, or displays for sale, any book, magazine, pamphlet, slide,
8 photograph, film, or electronic or digital media image depicting a minor engaging in a
9 prohibited sexual act, or engaging in an activity that involves nudity, or in the simulation of any
10 such act is guilty of a Class 6 felony.

11 Section 3. That § 22-22-24.1 be amended to read as follows:

12 22-22-24.1. Terms used in §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-
13 22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, mean:

14 (1) "Adult," a any person eighteen years of age or older;

15 (2) "Child pornography," any image or visual depiction of a minor engaged in prohibited
16 sexual acts;



1 (3) "Child" or "minor," any person under the age of eighteen years;

2 (4) "Computer," ~~an~~ any electronic, magnetic, optical, electrochemical, or other
3 high-speed data processing device performing logical, arithmetic, or storage
4 functions and includes any data storage facility or communications facility directly
5 related to or operating in conjunction with such device, including wireless
6 communication devices such as cellular phones. The term also includes any on-line
7 service, internet service, or internet bulletin board;

8 (5) "Deviant sexual intercourse," sexual conduct between persons not married to each
9 other consisting of contact between the penis and the anus, the mouth and the penis,
10 or the mouth and the vulva;

11 (6) "Digital media," any electronic storage device, including a floppy disk or other
12 magnetic storage device or any compact disc that has memory and the capacity to
13 store audio, video, or written materials;

14 (7) "Harmful to minors," any reproduction, imitation, characterization, description,
15 visual depiction, exhibition, presentation, or representation, of whatever kind or
16 form, depicting nudity, sexual conduct, or sexual excitement if it:

17 (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;

18 (b) Is patently offensive to prevailing standards in the adult community as a whole
19 with respect to what is suitable material for minors; and

20 (c) Taken as a whole, is without serious literary, artistic, political, or scientific
21 value for minors.

22 This term does not include a mother's breast-feeding of her baby;

23 (8) "Masochism," sexual gratification achieved by a person through, or the association
24 of sexual activity with, submission or subjection to physical pain, suffering,

1 humiliation, torture, or death;

2 (9) "Nudity," the showing or the simulated showing of the human male or female
3 genitals, pubic area, or buttocks with less than a fully opaque covering; or the
4 showing of the female breast with less than a fully opaque covering of any portion
5 thereof below the top of the nipple; or the depiction of covered male genitals in a
6 discernibly turgid state for the purpose of creating sexual excitement. This term does
7 not include a mother's breast-feeding of her baby irrespective of whether or not the
8 nipple is covered during or incidental to feeding;

9 (10) "Obscene," the status of material which:

10 (a) The average person, applying contemporary community standards, would find,
11 taken as a whole, appeals to the prurient interest;

12 (b) Depicts or describes, in a patently offensive way, prohibited sexual acts; and

13 (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

14 This term does not include a mother's breast-feeding of her baby;

15 (11) "Person," includes individuals, children, firms, associations, joint ventures,
16 partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and
17 all other groups or combinations;

18 (12) "Sadism," sexual gratification achieved through, or the association of sexual activity
19 with, the infliction of physical pain, suffering, humiliation, torture, or death;

20 (13) "Sadomasochistic abuse," flagellation or torture by or upon a minor, or the condition
21 of being fettered, bound, or otherwise physically restrained, for the purpose of
22 deriving sexual satisfaction, or satisfaction brought about as a result of sadistic
23 violence, from inflicting harm on another or receiving such harm oneself;

24 (14) "Sexual battery," oral, anal, or vaginal penetration by, or union with, the sexual organ

of another or the anal or vaginal penetration of another by any other object. This term does not include an act done for a bona fide medical purpose;

(15) "Sexual bestiality," any sexual act, actual or simulated, between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other;

(16) "Prohibited sexual act," actual or simulated sexual intercourse, deviant sexual intercourse, sadism, masochism, sexual bestiality, incest, masturbation, or sadomasochistic abuse; actual or simulated exhibition of the genitals or the pubic or rectal area in a lewd or lascivious manner; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; defecation or urination for the purpose of creating sexual excitement in the viewer; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. The term includes encouraging, aiding, abetting or enticing any person to commit any such acts as provided in this subdivision. The term does not include a mother's breast-feeding of her baby;

(17) "Sexual excitement," the condition of the human male or female genitals if in a state of sexual stimulation or arousal;

(18) "Sexually oriented material," any book, article, magazine, publication, visual depiction or written matter of any kind or any drawing, etching, painting, photograph, motion picture film, or sound recording that depicts sexual activity, actual or simulated, involving human beings or human beings and animals, that exhibits uncovered human genitals or the pubic region in a lewd or lascivious manner, or that exhibits human male genitals in a discernibly turgid state, even if completely and opaquely covered;

(19) "Simulated," the explicit depiction of conduct described in subdivision (16) of this section that creates the appearance of such conduct and that exhibits any uncovered portion of the breasts, genitals, or anus;

(20) "Visual depiction," any developed and undeveloped film, photograph, slide and videotape, and any photocopy, drawing, printed or written material, and any data stored on computer disk, digital media, or by electronic means that are capable of conversion into a visual image.

Section 4. That § 22-22-24.2 be amended to read as follows:

22-22-24.2. A person is guilty of possessing, manufacturing, or distributing child pornography if the person:

(1) Creates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act;

(2) Causes or knowingly permits the creation of any visual depiction of a minor engaged in a prohibited sexual act, or in the simulation of such an act; or

(3) Knowingly possesses, distributes, or otherwise disseminates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act.

Consent to performing these proscribed acts by a minor or a minor's parent, guardian, or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section.

A violation of this section is a Class 4 felony. If a person is convicted of a second or subsequent violation of this section within fifteen years of the prior conviction, the violation is a Class 3 felony.

~~Further, the~~ The court shall order a mental examination of ~~the~~ any person convicted of violating this section. The examiner shall report to the court whether treatment of the person is indicated.

1 Section 5. That § 22-22-24.4 be amended to read as follows:

2 22-22-24.4. Terms used in § 22-22-24.5 mean:

3 (1) "Minor," a person fifteen years of age or younger; and

4 (2) "Solicit," to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or
5 persuade a specific person by telephone, in person, by letter, by using a computer or
6 any other electronic means.

7 Section 6. That § 22-22-24.5 be amended to read as follows:

8 22-22-24.5. A person is guilty of solicitation of a minor if the person eighteen years of age
9 or older:

10 (1) Solicits a minor, or someone the person reasonably believes is a minor, to engage in
11 a prohibited sexual act; or

12 (2) Knowingly compiles or transmits by means of a computer; or prints, publishes or
13 reproduces by other computerized means; or buys, sells, receives, exchanges or
14 disseminates, any notice, statement or advertisement of any minor's name, telephone
15 number, place of residence, physical characteristics or other descriptive or identifying
16 information for the purpose of soliciting a minor or someone the person reasonably
17 believes is a minor to engage in a prohibited sexual act.

18 The fact that an undercover operative or law enforcement officer was involved in the
19 detection and investigation of an offense under this section does not constitute a defense to a
20 prosecution under this section.

21 Consent to performing a prohibited sexual act by a minor or a minor's parent, guardian, or
22 custodian, or mistake as to the minor's age is not a defense to a charge of violating this section.

23 A violation of this section is a Class 6 felony. If a person is convicted of a second or
24 subsequent violation of this section within fifteen years of the prior conviction, the violation is

1 a Class 5 felony.

2 ~~Further, the~~ The court shall order a mental examination of ~~the~~ any person convicted of
3 violating this section. The examiner shall report to the court whether treatment of the person is
4 indicated.

5 Section 7. That § 22-22-24.6 be amended to read as follows:

6 22-22-24.6. Any person, not a citizen or resident of this state, whose actions or conduct
7 constitute a violation of §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30,
8 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, and whose actions or conduct involve a
9 child residing in this state, or someone the person reasonably believes is a child residing in this
10 state, is for the purpose of §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-
11 30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, deemed to be transacting business in
12 this state and by that act:

- 13 (1) Submits to the jurisdiction of the courts of this state in any civil proceeding
14 commenced under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-
15 22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive; and
- 16 (2) Constitutes the secretary of state as agent for service of legal process in any civil
17 proceeding commenced under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-
18 22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive; and consents
19 that service of legal process shall be made by serving a copy upon the secretary of
20 state or by filing a copy in the secretary of state's office, and that this service shall be
21 sufficient service if, within one day after service, notice of the service and a copy of
22 the process are sent by registered mail by plaintiff to the person at the person's
23 last-known address and proof of such mailing filed with the clerk of court within one
24 day after mailing.

1 The service of legal process upon any person who is subject to the jurisdiction of the courts
2 of this state, as provided in this section, may also be made by personally serving the summons
3 upon the person outside this state with the same force and effect as though summons had been
4 personally served within this state. Such service shall be made in like manner as service within
5 this state. No order of court is required. An affidavit of the server shall be filed stating the time,
6 manner and place of service. The court may consider the affidavit, or any other competent
7 proofs, in determining whether service has been properly made.

8 Section 8. That § 22-22-24.7 be amended to read as follows:

9 22-22-24.7. Any person, except a minor, who knowingly participates in any conduct
10 proscribed by §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-
11 14.1, and 43-43B-1 to 43-43B-3, inclusive, is liable for civil damages.

12 Section 9. That § 22-22-24.8 be amended to read as follows:

13 22-22-24.8. Any of the following persons may bring an action for damages caused by
14 another person's conduct as proscribed by §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-
15 22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive:

- 16 (1) The child;
- 17 (2) ~~A~~ Any parent, legal guardian, or sibling of a victimized child;
- 18 (3) ~~A~~ Any medical facility, insurer, governmental entity, employer, or other entity that
19 funds a treatment program or employee assistance program for the child or that
20 otherwise expended money or provided services on behalf of the child;
- 21 (4) Any person injured as a result of the willful, reckless, or negligent actions of a person
22 who knowingly participated in conduct proscribed by §§ 22-19A-1, 22-22-24 to 22-
23 22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3,
24 inclusive.

1 If the parent or guardian is named as a defendant in the action, the court shall appoint a
2 special guardian to bring the action on behalf of the child.

3 Section 10. That § 22-22-24.9 be amended to read as follows:

4 22-22-24.9. Any person entitled to bring an action under § 22-22-24.8 may seek damages
5 from any person, except a minor, who knowingly participated in the production or in the chain
6 of distribution of any visual depiction proscribed by §§ 22-19A-1, 22-22-24 to 22-22-24.19,
7 inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive.

8 Section 11. That § 22-22-24.10 be amended to read as follows:

9 22-22-24.10. Any person entitled to bring an action under § 22-22-24.8 may recover all of
10 the following damages:

11 (1) Economic damages, including the cost of treatment and rehabilitation, medical
12 expenses, loss of economic or educational potential, loss of productivity,
13 absenteeism, support expenses, accidents or injury, and any other pecuniary loss
14 proximately caused by the proscribed conduct;

15 (2) Noneconomic damages, including physical and emotional pain, suffering, physical
16 impairment, emotional distress, mental anguish, disfigurement, loss of enjoyment,
17 loss of companionship, services, and consortium, and other nonpecuniary losses
18 proximately caused by the proscribed conduct;

19 (3) Exemplary damages;

20 (4) Attorneys' fees; and

21 (5) Disbursements.

22 Section 12. That § 22-22-24.11 be amended to read as follows:

23 22-22-24.11. Two or more persons may join in one action under §§ 22-19A-1, 22-22-24 to
24 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive,

as plaintiffs if their respective actions have at least one common occurrence of proscribed conduct under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, and if any portion of the period of such conduct overlaps with the period for every other plaintiff. Two or more persons may be joined in one action under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, as defendants if those persons are liable to at least one plaintiff.

Section 13. That § 22-22-24.12 be amended to read as follows:

22-22-24.12. Any person against whom a judgment has been rendered under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, is not eligible to exempt any property, of whatever kind, from process to levy or process to execute on the judgment. Any assets sought to satisfy a judgment under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, that are named in a forfeiture action or have been seized for forfeiture by any state or federal agency may not be used to satisfy a judgment unless and until the assets have been released following the conclusion of the forfeiture action or released by the agency that seized the assets.

Section 14. That § 22-22-24.13 be amended to read as follows:

22-22-24.13. Any action for damages under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, shall be commenced within six years of the time the plaintiff knew, or had reason to know, of any injury caused by violations of §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive. The knowledge of a parent, guardian, or custodian may not be imputed to the minor.

1 For a plaintiff, the statute of limitations under this section is tolled while any potential
2 plaintiff is incapacitated by minority.

3 Section 15. That § 22-22-24.14 be amended to read as follows:

4 22-22-24.14. On motion by a governmental agency involved in an investigation or
5 prosecution, any civil action brought under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive,
6 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, shall be stayed until
7 the completion of the criminal investigation or prosecution that gave rise to the motion for a stay
8 of the action. The statute of limitations as provided in § 22-22-24.13 shall be tolled for the time
9 any such stay is in effect.

10 Section 16. That § 22-22-24.15 be amended to read as follows:

11 22-22-24.15. Any person who is convicted of an offense under §§ 22-19A-1, 22-22-24 to
12 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive,
13 shall forfeit to the state the person's interest in the following and no property right exists in
14 them:

15 (1) Any photograph, film, videotape, book, digital media or visual depiction that has
16 been manufactured, distributed, purchased, possessed, acquired, or received in
17 violation of §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30,
18 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

19 (2) Any material, product, and equipment of any kind that is used or intended for use in
20 manufacturing, processing, publishing, selling, possessing, or distributing any visual
21 depiction proscribed by §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25,
22 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

23 (3) Any property that is used, or intended for use, as a container for property described
24 in subdivisions (1) and (2) of this section, including any computers and digital media;

- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession or concealment of any visual depiction proscribed under §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (6) Any funds or other things of value used for the purposes of unlawfully purchasing, attempting to purchase, distributing, or attempting to acquire or distribute any visual depiction proscribed by §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful sale or purchase, attempted sale or purchase, distribution, or attempted distribution of any visual depiction proscribed by §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive, 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive.

Any property described in subdivision (1) of this section shall be deemed contraband and shall be summarily forfeited to the state. Any other property seized and forfeited shall be used to reimburse the actual costs of the criminal investigation and prosecution. Any amount over and above the amount necessary to reimburse for the investigation and prosecution shall be used to satisfy any civil judgments. The ~~secretary of the Department of Social Services~~ attorney general shall promulgate rules, pursuant to chapter 1-26, to implement the distribution of seized and forfeited assets.

Section 17. That § 22-22-24.16 be amended to read as follows:

1 22-22-24.16. Any person working at or for an internet service provider or other electronic
2 communication service who has knowledge of or observes, within the scope of the person's
3 professional capacity or employment, a visual depiction that depicts a minor whom the person
4 knows or reasonably should know to be under the age of eighteen, engaged in prohibited sexual
5 acts or in the simulation of prohibited sexual acts, shall report the depiction to his or her
6 employer or supervisor. The depiction shall then be reported to an appropriate law enforcement
7 agency as soon as reasonably possible. The provider need not report to law enforcement
8 depictions involving mere nudity of the minor, but shall report visual depictions involving
9 prohibited sexual acts. This section may not be construed to require a provider to review all
10 visual depictions received by subscribers or handled by the provider within the provider's
11 professional capacity or employment.

12 It is unlawful for any owner or operator of a computer on-line service, internet service, or
13 local internet bulletin board service knowingly to permit a subscriber to utilize the service to
14 produce or reproduce visual depictions of prohibited sexual acts with a minor.

15 A violation of this section is a Class 1 misdemeanor. However, a violation of this section
16 does not constitute grounds for a civil action for damages against any person.

17 Section 18. That § 22-22-24.17 be amended to read as follows:

18 22-22-24.17. Any person working at or for a commercial film and photograph print
19 processor who has knowledge of or observes, within the scope of the processor's professional
20 capacity or employment, a film, photograph, video tape, negative, slide or other visual depiction
21 that depicts a minor whom the processor knows or reasonably should know to be under the age
22 of eighteen, engaged in prohibited sexual acts or in the simulation of prohibited sexual acts,
23 shall report the depiction to his or her employer or supervisor. The depiction shall then be
24 reported to an appropriate law enforcement agency as soon as reasonably possible. The

processor need not report to law enforcement depictions involving mere nudity of the minor, but shall report visual depictions involving prohibited sexual acts. This section may not be construed to require a processor to review all films, photographs, videotapes, negatives, or slides delivered to the processor within the processor's professional capacity or employment.

It is unlawful for any owner or operator of a photography or film studio, photograph or film developing service, photograph or film reproducing service, or video to film reproducing service knowingly to permit any person to utilize photograph or film reproduction or development services to produce or reproduce visual depictions of prohibited sexual acts with a minor.

A violation of this section is a Class 1 misdemeanor. However, a violation of this section does not constitute grounds for a civil action for damages against any person.

Section 19. That § 22-22-24.18 be amended to read as follows:

22-22-24.18. Any commercial computer repair technician who has knowledge of or observes, within the scope of the technician's professional capacity or employment, a film, photograph, video tape, negative, slide or other visual depiction of a minor whom the technician knows or reasonably should know to be under the age of eighteen, engaged in prohibited sexual acts or in the simulation of prohibited sexual acts, shall report the depiction to an appropriate law enforcement agency as soon as reasonably possible. The computer repair technician need not report to law enforcement depictions involving mere nudity of the minor, but shall report visual depictions involving prohibited sexual acts. This section may not be construed to require a computer repair technician to review all data, disks, or tapes delivered to the computer repair technician within the computer repair technician's professional capacity or employment.

A violation of this section is a Class 1 misdemeanor. However, a violation of this section does not constitute grounds for a civil action for damages against any person.

Section 20. That § 22-22-24.19 be amended to read as follows:

1 22-22-24.19. ~~Sections~~ The provisions of §§ 22-19A-1, 22-22-24 to 22-22-24.19, inclusive,
2 22-22-25, 22-22-30, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive, do not apply to the
3 performance of official duties by any law enforcement officer, court employee, attorney,
4 licensed physician, psychologist, social worker, or any person acting at the direction of a
5 licensed physician, psychologist, or social worker in the course of a bona fide treatment or
6 professional education program.

7 Section 21. That § 22-22-25 be amended to read as follows:

8 22-22-25. ~~Section~~ The provisions of § 22-22-24 and §§ 22-22-24.2, 22-22-24.3, and 22-22-
9 24.5 do not apply to the selling, lending, distributing, exhibiting, giving away, showing,
10 possessing, or making of films, photographs, or other materials involving only nudity, if the
11 materials are made for and have a serious literary, artistic, educational, or scientific value.